



What Works: An Analysis of State Brownfield and Voluntary Cleanup Programs

Objective

This paper assists policy makers and other interested parties in better understanding the key elements in state brownfield and Voluntary Cleanup Programs (VCPs) that will attract all stakeholders to participate in the cleanup and the redevelopment of brownfields. National Brownfield Association (NBA) Chapter Executive Teams provided input and the NBA Advisory Board drafted this analysis. Both groups consist of diverse redevelopment specialists who are NBA members and have worked extensively with state programs around the country. The members also participated in the annual NBA Brownfield Leadership Summit held in Washington, D.C., in May 2005, which addressed this issue.

Background

States began creating brownfield and voluntary cleanup programs in the late 1980s in response to the complexities of the Superfund process and the realization that public funding was not sufficient to address all sites. These programs allow property owners or their designees to voluntarily enter a site into a state regulatory process to complete the cleanup of their property. The state and the voluntary party agree to the cleanup approach needed to achieve state-specified levels that are “protective of human health and the environment.” In the mid 1990s, the United States Environmental Protection Agency (EPA) formally recognized the benefits of the state brownfield programs and VCPs. All states have since moved to some extent to create similar forms of programs.

The federal brownfields law, enacted in 2002 (formally titled the Small Business Liability Relief and Brownfield Revitalization Act), largely recognizes states as the primary regulator for brownfield sites. An important element of the Act was the creation of the federal enforcement bar, which ensures that when a site goes through a state program, the state becomes the primary regulator and the federal government cannot use Superfund enforcement authority over that site.

Upon completion of the cleanup process, the voluntary party receives a document (e.g., comfort letter or no further action letter), which provides some degree of environmental closure and clarity of the party’s future liability obligation. In most states, the liability protection does not attach to the responsible party who discharged the substance(s) necessitating the cleanup (even if they have done the voluntary cleanup).

States vary greatly in the way in which cleanups are implemented and the amount of state oversight that is provided. Many states take a traditional regulatory approach, while other states have developed alternative programs. For example, Massachusetts was the first state to privatize a portion of the state cleanup program through the use of Licensed Site Professionals (LSPs). Overall, state brownfield programs and VCPs have been effective because they foster public private partnerships to promote redevelopment. The EPA has tallied more than 50,000 properties that have been cleaned up using state brownfield programs

and VCPs over the last decade, ranging from small commercial properties (e.g., gas stations and dry cleaners) to large industrial facilities.

Most state programs have common components: a definition of a brownfield, eligibility requirements, financial incentives, and some degree of liability relief. However, it is difficult to compare programs because the details of these components vary greatly from state to state. For example, South Carolina defines brownfields as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” On the other hand, Michigan has a more expansive functional definition: a brownfield is “any contaminated or potentially contaminated property with a potential for redevelopment. In 88 of the state’s urban areas, this includes blighted and functionally obsolete properties as well as contaminated properties.”

To further complicate a comparative analysis, some states have multiple regulatory programs, which a brownfield or VCP-eligible site may enter. A VCP may not be the only state oversight program that regulates property cleanup, and in fact, some sites are obligated by law, regulation or policy to enter into a non-brownfield program instead. For example, in New Jersey, cases are assigned to a specific program based on site type – regulated underground storage tanks (UST) are entered into the UST program while sites in brownfield development areas are in the Office of Brownfield Reuse. Conversely, in Illinois, an owner may be able to choose which program oversees cleanup (for example, an UST site may be entered into either the UST program or the Site Remediation Program). Thus, it is difficult to compare “programs” within states and between states because each is based on a different legislative framework and program rules.

State brownfield programs continue to evolve to meet new challenges, but a number of impediments remain. Buyers and sellers are still concerned that the level of environmental liability relief may not be meaningful, and that lingering third party liability issues remain. The lack of liability clarity is causing a number of corporate property owners to hold on to sites. Another barrier is that, although most states consider planned end use when determining cleanup levels, some do not allow the use of site-specific risk assessments. This causes owners and prospective purchasers to perceive some state cleanup standards as too stringent or inflexible. These impediments create a situation where cleanups may be technically feasible but not economically viable for redevelopment, and result in developers and investors favoring construction on greenfields. Moreover, state programs are beginning to suffer from the success of the brownfield market; the increased number of sites seeking to enter VCPs and brownfield programs has put considerable pressure on these programs, which causes slower response times, competition for financial incentives and increases the administrative cost of operating programs.

In an effort to address these impediments, states have been innovative in developing unique program elements that work. Although no one “best” program exists that addresses all barriers, the National Brownfield Association (NBA) has analyzed and identified the key elements that have worked well in different programs. The purpose of this paper is to assist policymakers in better understanding the key program elements that work.

Recommended Program Elements

A brief summary of the selected state program attributes that work well (largely in states which NBA has chapters) will be presented in a forthcoming matrix. The matrix will list program elements and include a detailed explanation of the state example along with the specific citing.

The NBA found that key program elements that work could be grouped into four general categories: 1) environmental closure and liability clarity, 2) agency resources, 3) cleanup goals, and 4) financial incentives. Highlights of key program elements that were identified include:

1. Environmental closure and liability clarity

- a. ***Programs should maximize liability relief and limit reopeners.*** Many state programs have “reopener” clauses if unknown contamination or factual misrepresentation is discovered. However, this has not been tested in the courts and uncertainty to the extent of the environmental liability relief and to whom the clauses apply is still unclear.
- b. ***The process results in a predictable regulatory path to closure*** that provides for a single point of agency contact and a regulatory process that is easy to follow with defined endpoints.
- c. ***The program is broad-based, with a wide range of sites eligible*** to participate. Broad based programs that encompass more redevelopment scenarios and stakeholders generally add consistency and ease the confusion for redevelopment parties.
- d. ***The program provides relief or a legal defense from third-party statutory remediation and tort action after sites are properly closed.*** Uncertainty of possible third party action restrains property transactions, and some states have started to address the issue this provision provides.

2. Agency resources

- a. ***The state provides agency resources and trained staff dedicated to brownfields and VCPs*** to provide information and support to a wide range of stakeholders.
- b. ***A single point of agency contact*** will champion the project to completion and coordinate interagency involvement.
- c. ***The program statutorily or administratively provides for a quick and timely response,*** within time frames needed for decision-making.
- d. ***Program officials and staff have the capacity to treat the applicant like a “customer”*** to attract voluntary participation and ensure proper use.
- e. ***The program provides a mechanism that fosters quality information and outreach*** to the real estate sector, communities, and other brownfield stakeholders.
- f. ***Federal resources given to the state are used to establish, enhance and administer their program.*** States should continue to seek this support.

3. Cleanup goals to protect human health and the environment

- a. ***Allow a flexible approach to risk assessment that includes tiered cleanup levels based on the planned end use of property.*** This includes options such as “screening” approaches for simple sites and site-specific risk assessments for complicated sites or those with unusual chemicals of concern. This allows property owners to take advantage of environmentally appropriate, yet cost-effective strategies.

- b. *Cleanup goals are clear and understandable to all stakeholders* to minimize uncertainty and the potential for unnecessary conflicts over reuse approaches.
 - c. *Cost-effective innovative remedial technologies or “presumptive remedies”* are permitted and encouraged where they will likely lead to protective cleanups with redevelopment cost-saving.
 - d. *Institutional and/or land use controls can be tracked and enforced* to protect human health and the environment.
4. **Financial incentives to meet brownfield needs**
- a. *Assistance with site assessments* can provide financing not available elsewhere to help site owners and prospective purchasers get critically needed information that allows property redevelopment costs to be sufficiently quantified.
 - b. *Help with actual hard cleanup costs*, an activity critical to site redevelopment, is not generally bankable on its own.
 - c. *Incentives that finance demolition of structures, lead-based paint remediation and/or asbestos abatement, as well as offset other site preparation costs (planning, infrastructure, etc.)* may be needed to balance brownfield and greenfield redevelopment costs.
 - d. *Creative forms of tax incentives that attract private investment*, one of the typical economic development functions of government, can help channel private interest into site cleanup and redevelopment in areas that might not otherwise be economically competitive.

Evolving Issues

During the 2005 NBA Brownfield Leadership Summit, some other significant issues were identified that are becoming apparent as programs gather more experience. These issues should be evaluated by states when looking to reauthorize their programs. Issues to consider include:

1. Who will be responsible when properly remediated sites are reopened (e.g., for assessment of vapor intrusion into buildings)?
2. What is the most appropriate way of tracking, maintaining, verifying and enforcing institutional controls, especially given the staffing and budget pressures that many state agencies face?
3. What is the best and most appropriate use of licensed professionals?
4. How will the use of eminent domain by local governments be affected by the *Kelo v. City of New London* decision? What impact will it have on brownfield redevelopment strategies?
5. What impact will the *Cooper Industries, Inc. v. Aviall Services, Inc.* decision (ability to sue for cost recovery without government regulatory action) have on the redevelopment of brownfields?
6. With increasing frequency, states are beginning to require that property owners provide financial assurance to cover the cost of existing and future cleanups. What impact will this have on the brownfield redevelopment?

Conclusion

State voluntary cleanup programs have been effective in fostering the redevelopment of brownfield properties for more than a decade, and have gone a long way toward expediting the rate and number of cleanups in many states. Each state program is different, and brownfield and VCP programs have evolved to take account of the differences of that state. As these programs are periodically reauthorized and improved, the NBA suggests that key elements and “lessons learned” from the most successful state programs be considered during reauthorization.